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DISCRIMINATION LAW:
EQUALITY IN THE PRIVATE SECTOR

2010-2011

Volume 1

Professor Denise Réaume

Faculty of Law
University of Toronto

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applicable in interpreting its provisions. To apply such rules might result in ignoring the dominant purpose of human rights legislation: *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 546-47 (*per* McIntyre.); *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114.

(6) Differences in wording between the provisions of human rights legislation in different provinces should not be interpreted so as to obscure the essentially similar purposes of the provisions, unless clearly different legislative purposes are stated or implied: *University of British Columbia v. Berg*, [1993] 2 S. C. R. 3 5 3, 18 C. H. R. R. D/310 at D/322, para. 32; *Gould v. Yukon Order of Pioneers* (1996), 25 C.H.R.R. D/87 (S.C.C.).

(7) A human rights code is remedial legislation and is to be given such interpretation as will best insure that its objects are attained (*Canadian National Railway v. Canada*, *supra*, *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)* (1994), 21 C.H.R.R. D/259 (Ont. C.A.)). One of the general objects of human rights legislation "is to secure, as far as is reasonably possible, equality, that is to say fairness . . .": *Chambly (Commission scolaire régionale c. Bergevin)*, [1994] S.C.J. No. 5 7 at 16 (*per* Cory J.).

(8) A human rights code should be interpreted so as to guarantee to all members of society that they will be assessed as individuals on the basis of their own merits rather than on the basis of belonging to a group identified by a personal characteristic mentioned in the code. *Brossard (Town) v. Quebec*, [1988] 2 S.C.R. 279 at 297-98, [10 C.H.R.R. D/5515 at D/5525-55261 (*per* Beetz 1.) and 344 [D/55591 (*per* Wilson J.), *Air Canada v. Carson*, [1985] 1 F.C. 209 at 239 16 C.H.R.R. D/2848 and D/28521 (C.A.); *Cashin v. CBC.*, [1988] 3 EC. 494 and 506 (9 C.H.R.R. D/5343 and D/53491 (C.A.)).

(9) Jurisprudence pertaining to the interpretation of the *Charter of Rights and Freedoms*, particularly s. 15, may be relied upon in interpreting human rights code guarantees: see *Dickason v. University of Alberta*, [1992] 2 S.C. R. 1103; *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)*, *supra*.

...

Note: It is often remarked upon that Human Rights Codes are quasi-constitutional statutes, and therefore should be given a large and liberal interpretation. For example, in *C.N. v. Canada (Canadian Human Rights Commission), (Action Travail des Femmes)*, [1987] 1 S.C.R. 1114, the Supreme Court summarized this interpretive stance as follows:

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the *Interpretation Act*, ..., as amended. As E. A. Driedger, *Construction of Statutes*, p. 87 has written:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The purposes of the Act would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve “the life that he or she is able and wishes to have”, the Act seeks to prevent all “discriminatory practices” based, *inter alia*, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination. ...

The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in *Heerspink*, ..., where Lamer J. emphasized that a human rights code “is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law”. This principle of interpretation was further articulated by McIntyre J., for a unanimous Court, in *Winnipeg School Division No. 1 v. Craton*, ...:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

The emphasis upon the “special nature” of human rights enactments was a strong indication of the Court’s general attitude to the interpretation of such legislation.

In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, ..., the Court set out explicitly the governing principles in the interpretation of human rights statutes. Again writing for a unanimous Court, McIntyre J. held, at pp. 546-7:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment, ... and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

...

On the other hand, the Court has also repeatedly warned against taking this generous approach too far. For example, in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, Chief Justice Lamer said,

This interpretive approach does not give a board or court license to ignore the words of the *Act* in order to prevent discrimination whenever it is found. While this may be a laudable goal, the legislature has stated, through the limiting words in s. 3 [of the *British Columbia Human Rights Act*], that some relationships will not be subject to scrutiny under human rights legislation. It is the duty of boards and courts to give s. 3 a liberal and purposive construction, without reading the limiting words out of the *Act* or otherwise circumventing the intention of the legislature.



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CHAPTER 2: DEFINING DISCRIMINATION: AN OVERVIEW

NOTE: The antidiscrimination provisions of the *Ontario Human Rights Code* effectively created a new cause of action. A discrimination complaint is structured around three conceptual pillars:

1. the grounds upon which an individual may not be denied a good or opportunity - or the **bases** of unlawful discrimination -,
2. the type of good, benefit, or opportunity access to which is protected - or the **spheres** within which discrimination is prohibited -, and
3. what constitutes “discrimination” so as to make a denial unlawful – this is connected to what we might call the **fault** standard for discrimination.

Together, these conceptual pillars determine the scope of the *Human Rights Code*. A valid complaint will consist of:

- *discrimination*,
- connected to a *prohibited ground*,
- within a *protected sphere*.

This chapter of the materials begins our exploration of these pillars and the relationship between them. We will turn to the specific legal issues that arise in interpreting the grounds and spheres later in the materials. We start by focusing on the third pillar – what counts as *discrimination* because of a prohibited ground.

“Equal Treatment without Discrimination *because of* ...”

Central to the design of a cause of action is an account of the nature of the wrong – the kind of behaviour that counts as wrongful and why. This understanding of what the wrong of discrimination is must be tailored to the interest(s) to be protected, and will therefore be linked to our reasons both for selecting certain grounds for discrimination as prohibited and for selecting certain spheres to be governed by anti-discrimination norms. Yet, as Judith Keene points out (*Human Rights in Ontario*, 2nd edn., Toronto: Carswell, 1992, p. 5), the *Ontario Code* does not define “equal treatment without discrimination”, the cornerstone concept of discrimination law. This has left it up to adjudicators – Boards of Inquiry or Tribunals, and judges – to fashion an account of what is the interest in equal treatment and what makes behaviour “discriminatory” and therefore unlawful.

The starting point for devising an account of what discrimination is focuses on the language typical of most Human Rights Codes guaranteeing the right to equal treatment without discrimination *because of* any of a number of prohibited grounds. This language suggests that discrimination consists in some kind of factual causal link between the behaviour of the Respondent and one of the prohibited grounds of discrimination. A key question in the development of discrimination law has been what link is required. The ordinary language meaning of ‘discriminate’ suggests that discrimination is a matter of differentiating between people – treating some differently than others. Which contexts of differential treatment are legally relevant is given by the spheres covered by the Code – employment, housing, and services, for example. The prohibited bases of differentiation are identified by the enumerated grounds.

When, as in the notorious case of *Christie v. York Corp.*, [1940] S.C.R. 139, a waiter tells the customer that he had been 'instructed not to serve coloured people', there can be no doubt that the refusal of service is 'because of' race. In *Christie*, race, which is a prohibited ground, is expressly used as a criterion to determine who will and will not be served. But *Christie* was more than a case of differential treatment because of a prohibited ground. It is also clear from the facts and context that the underlying reason for the refusal to serve Mr Christie was prejudice. It was common in the early case law under the new human rights codes – enacted to deal with situations like *Christie* – for respondents and adjudicators to assume that "discrimination" meant acting against (refusing employment, services, etc.) the members of a particular group out of prejudice. In other words, this *particular* motive or reason underlying the treatment of the complainant was part of the legal concept of discrimination. The assumption was that "discrimination because of a prohibited ground" means differential treatment *because of a certain attitude* towards members of a group identified by a ground.

Gradually, the adjudicators rejected a prejudice-based conception of discrimination. Developments can be traced by tracking the circumstances in which reasons which were not prejudice-based offered by a respondent for using one of the grounds in the Code to differentiate between people were nevertheless rejected as negating discrimination. With each reason for differentiating that was held not to be exculpatory, the scope of the legal concept of discrimination expanded. Much of this development took place under the rubric of the argument about whether the respondent's criteria for selection constituted a *bona fide* requirement for inclusion in the enterprise. The Codes all provide for some circumstances in which establishing such a requirement renders the prohibition on discrimination inapplicable or makes what would otherwise be discriminatory conduct not legally discriminatory.

These developments show that the ultimate imposition of liability for discrimination depends on the interplay between the applicant's allegation of differential treatment based on a prohibited ground and the reasons offered by the respondent in support of its rule or practice. This structure crystallized in *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202 (excerpted below), which involved a mandatory retirement age of 60 for firefighters. The Supreme Court took it for granted that the explicit use of age in the collective agreement constituted differential treatment 'because of' age and treated this as sufficient to say the complainants had established a *prima facie* case of discrimination under the Code. It was then up to the respondent to explain its use of age in such a fashion as to justify its characterization as a *bona fide* requirement. In this way, the Court established a standard division of labour between complainant and respondent and outlined the general test for whether a *bona fide* requirement is made out.

Etobicoke seemed to settle the approach to be taken in cases in which the respondent explicitly uses one of the grounds in the Code as the basis for its decisions. But sometimes an employer, for example, adopts a rule or policy or criterion of selection that does not rely on a prohibited ground, and yet has a tendency to affect members of one group more than another. For example, requiring police officers to be at least 5' 10" tall and weigh at least 160 lbs is likely to screen women and members of some ethnic groups out of the force. Tribunals and courts ultimately decided that a claim of discrimination because of a prohibited ground can be made in such circumstances, although, as with cases like *Etobicoke*, an escape hatch was left for employers to justify their conduct in certain circumstances. The new approach was affirmed by the Supreme Court in *O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (excerpted below). The case is hailed for introducing an "effects-based" conception of discrimination and thereby enlarging the scope of discrimination law.

Because the rule at issue in *O'Malley* made no explicit reference to one of the grounds, the Court had to enlarge the notion of differential treatment to cover such cases. It did so by reference to the discriminatory effect of the policy, which was described as the imposition "because of some special characteristic of the employee or group, [of] obligations, penalties, or restrictive conditions *not imposed* on others." Put more concisely, discrimination is differential treatment connected to a prohibited ground. When a respondent adopts a general rule the effect of which is to exclude particular group of people identified by reference to a prohibited ground, the rule's discriminatory effect can be determined independently of the respondent's reasons for adopting it. The rule produces a pattern of consequences; that pattern allows us to see whether the negative effects of the rule are connected to or affect people because of their membership in a group identified by one of the grounds in the *Code*.

Etobicoke and *O'Malley*, taken together, provide a general structure for the adjudication of human rights code complaints. The burden on the complainant is to show that she experienced differential treatment that is connected to a prohibited ground, whereupon the respondent must explain or justify the rule or policy in issue. Both kinds of case – where the respondent used a prohibited ground as a criterion for selection, and where a neutral rule affects those identified by a ground worse than others – can be described as revealing a discriminatory effect that calls for some explanation from the respondent. Where the prohibited ground has been explicitly used, the discriminatory effect is categorical; in cases involving a neutral rule, the effect may be more difficult to discern.

This approach works relatively smoothly when the respondent was acting pursuant to a rule or policy from which the effects on those in the complainant's group can be ascertained. However, many complaints involve no apparent rule or policy the general effects of which can be observed. Instead, they involve a relatively discrete interaction between two individuals in which one makes an unfavourable decision about the other: C applies for a job, but R rejects her in favour of another candidate. Was the rejection because of a prohibited ground? Without a formal rule or general practice, how can we ascertain differential treatment connected to a prohibited ground? It may turn out that analyzing the respondent's ulterior reasons is crucial.

However, ascertaining the reasons that explain a respondent's behavior in these cases is not always easy. As William Black noted ("From Intent to Effect: New Standard in Human Rights" (1980) 1 CHRR C/1), speaking about the need to prove intention, "The only cases that were easy to prove were those involving respondents who openly admitted bias or took no steps to conceal it, either because they were proud of their prejudices or so unaware of current standards as not to realize the implications of their admission." Without direct knowledge of the respondent's reasons, and in the absence of a clear expression of his reasons, as was available in *Christie*, the adjudicator must draw whatever inferences seem appropriate from circumstantial evidence. This can be a complex task. *Shakes v. Rex Pak Ltd.*, (1981), 3 C.H.R.R D/1001 (excerpted below) provides an example.

In these cases, too, adjudicators have adopted the two stage approach outlined above – requiring the applicant to make out a *prima facie* case of discrimination, then requiring the respondent to explain and justify her conduct. In cases involving discrete interactions between individuals, it can be harder to draw a clear line between the *prima facie* case that the complainant must establish and the second stage of probing the respondent's exculpatory explanations. We will return to an extended consideration of the difficulties involved in litigating these sorts of cases later in the course.

This overview has identified three kinds of fact situation that may give rise to a discrimination complaint: cases involving the explicit use of one of the grounds in the

Code to exclude from some benefit; cases involving a neutral rule that has the effect of disproportionately excluding members of one group from some benefit; and discrete interactions seemingly not governed by any rule, but in which the applicant claims that she was denied a benefit because of her membership in a group identified by reference to a ground in the Code. We now turn to an example of each of the three.

A. Three Types of Discrimination Case: Factual Variations

Ontario Human Rights Commission v. Borough of Etobicoke

(1982), 132 D.L.R. (3d) 14 (S.C.C.)

Note: At the time of this litigation the relevant provisions of the Code were as follows:

4(1) No person shall,

...

(b) dismiss or refuse to employ or to continue to employ any person;

because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee.

...

(6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a bona fide occupational qualification and requirement for the position or employment.

Section 4(1) prohibits certain conduct, while s. 4(6) outlines conditions under which that prohibition does not apply. Compare the equivalent provisions in the current Code. Has the structure changed in any significant sense?

The judgment of the Court was delivered by

McINTYRE J.:—This appeal concerns the construction of s. 4(6) ... of the Ontario *Human Rights Code* ... in a case where it is alleged that a mandatory retirement at age 60, provided for in a collective agreement, contravenes the provisions of the Code by discriminating against certain employees on the basis of age.

The individual appellants Hall and Gray were employed by the respondent municipality as fire-fighters. The terms of their employment were contained in a collective agreement which provided that the fire-fighters would be compulsorily retired at age 60. Hall and Gray attained that age and their employment was terminated. Each filed a complaint under the Ontario *Human Rights Code*. The Minister of Labour ... appointed one Bruce Dunlop as a board of inquiry. He decided after a hearing that the compulsory retirement of the appellants amounted to a refusal to employ, or to continue to employ them, contrary to s. 4(1)(b) of the Code. He rejected the employer's defence that the compulsory retirement at age 60 constituted a *bona fide* occupational qualification and requirement for the position or employment within s. 4(6) of the Code. He ordered the reinstatement of the appellants provided that they continued to possess the requisite physical and mental capacities to carry out their jobs. He ordered, as well, compensation for loss of earnings from the date of retirement to the date of reinstatement.

...It was common ground that the compulsory retirement at age 60 constituted a refusal to employ or continue to employ the complainants. While discrimination on the

B. Recent Challenges to the Two Step Structure for Analyzing Complaints

Note: The structure of analysis arising out of *Etobicoke* and *O'Malley* seems to impose a fairly low threshold on the applicant at the point of making out a *prima facie* case. Under these circumstances, most cases involving action pursuant to a rule or policy turn on whether the respondent can establish a *bona fide* requirement or other defence. Applicants rarely lose, under this approach, for failure to establish the *prima facie* case.

However, as jurisprudence developed under the equality provisions of the *Charter*, it became clear that the burden on a claimant to establish a section 15 violation was significantly higher. This approach crystallized in *Law v. Canada* [1999] 1 S.C.R. 497 (excerpted below). Since then, respondents have argued with increasing frequency that the "Law test" should be incorporated into the *prima facie* case stage of a human rights code complaint. The implications of this argument constitute an important theme in the course. We will explore the case law more fully later, after setting out the background by way of the main developments in the articulation of the BFR test since *O'Malley*. Here we want just to get a sense of the debate by looking at a case that is currently before the Ontario Court of Appeal and may well shape the future direction of the law.

Law v. Canada (Minister of Employment and Immigration)

[1999] 1 S.C.R. 497

Iacobucci J.

...

B. The Purpose of s. 15(1)

40 As was emphasized in early *Charter* decisions such as *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, and *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, and reiterated by McIntyre J. in *Andrews*, *supra*, the proper approach to the definition of rights guaranteed by the *Charter* is a purposive one. The purpose of s. 15(1) is to be sought, in the words of Dickson J. (as he then was) in *Big M*, *supra*, at p. 344, "by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and . . . to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*".

41 Since the beginning of its s. 15(1) jurisprudence, this Court has recognized that the existence of a conflict between an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. This principle holds true with respect to each element of a discrimination claim. The determination of whether legislation fails to take into account existing disadvantage, or whether a claimant falls within one or more of the enumerated and analogous grounds, or whether differential treatment may be said to constitute discrimination within the meaning of s. 15(1), must all be undertaken in a purposive and contextual manner.

42 What is the purpose of the s. 15(1) equality guarantee? There is great continuity in the jurisprudence of this Court on this issue. In *Andrews*, *supra*, all judges who wrote advanced largely the same view. McIntyre J. stated, at p. 171, that the purpose of s. 15 is

CHAPTER 3: THE RESPONDENT'S SIDE OF THE STORY

A. *Bona Fide* Requirements and Reasonable Accommodation: What's the Difference?

Note: In *O'Malley* (Vol. 1, p. 49), the Supreme Court distinguished cases of direct discrimination from those involving discriminatory effects as it held that the latter could be covered by the prohibition on discrimination. The former kind of case, when a Respondent explicitly uses a prohibited ground as an exclusionary criterion, is a more obvious form of discrimination. The explicit use of a ground makes clear that it is (part of) the reason for the complainant's exclusion thus satisfying the conventional test for *prima facie* discrimination. However, as we've seen, liability does not necessarily follow, even in this paradigmatic form of discrimination. All Human Rights Codes have exculpatory provisions allowing Respondents in some spheres, with respect to some grounds, to argue that the use of the ground to exclude some from the benefit in issue is *bona fide* and therefore not discriminatory.

Therefore, we cannot say we fully understand the cause of action, nor perhaps discrimination itself, until we bring these exculpatory conditions into play. Historically, these provisions have been phrased in the language of "bona fide requirement" (BFR) in the context of direct discrimination. The main interpretive challenge in *O'Malley* was the fact that the provision in the Ontario *Code* limiting the right to equal treatment without discrimination in respect of employment (the BFR clause) did not apply to discrimination because of religion. In other words, the list of grounds on which discrimination was prohibited was longer than the list of grounds for which an exculpatory BFR argument was available. In recognizing that a policy having differential adverse effects on members of a particular religion constitutes *prima facie* discrimination because of religion, the Supreme Court recognized that there could nevertheless be circumstances in which liability should not be imposed, that is, it recognized limits to the right not to suffer adverse effects discrimination. It held that Respondents have a duty to accommodate the needs of those adversely affected by a discriminatory policy, but only up to the point of undue hardship. The Court crafted its own exculpatory doctrine to fill the gap in the Ontario *Code*. In doing so, it did not use the language of BFR, the usual statutory phrasing, but rather the language of "accommodation up to the point of undue hardship": As we shall see, this seemed to create a different conceptual framework at the justification stage for each of the forms of discrimination. This began an extended debate about what the differences are between the two 'defences'.

The Ontario *Code* represented one standard model of drafting at the time of *O'Malley*. The *Canadian Human Rights Act* of the time illustrates a different model. The federal *Act* includes the usual list of prohibited grounds of discrimination. However, its exculpatory provision – drafted using BFR language, is more general than the Ontario *Code*'s. Compare the relevant Ontario provisions as at the time of *O'Malley* with their CHRA counterparts:

Ontario Human Rights Code (as at 1980)

4(1) No person shall,

(g) discriminate against any employee with regard to any term or condition of employment,

because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee.

4(6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a bona fide occupational qualification and requirement for the position or employment.

Canadian Human Rights Act (as at 1977)

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

10. It is a discriminatory practice for an employer or an employee organization

(a) to establish or pursue a policy or practice,

...

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

14. It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

The language of the federal *Act* was more conducive to an interpretation of the concept of discrimination that includes apparently neutral policies that adversely affect those identified by reference to a prohibited ground. Indeed, the Supreme Court had no trouble in *Bhinder v. C.N.*, (excerpted below) in finding that the federal *Act* covers adverse effects discrimination, that is, the right not to be discriminated against includes the right not to suffer adverse effects connected to a prohibited ground.

That left the question of the interpretation of the federal *Act*'s BFR-based exculpatory provision in such a case. Note that the *Act*'s BFR clause applies to any discriminatory act or policy, no matter what the prohibited ground, and to both explicit use of a prohibited ground and facially neutral policies having a discriminatory effect. *Etobicoke* established a test for satisfying the BFR 'defence' in the case of the explicit use of a prohibited ground; how would that test be applied or adapted in an adverse effects case? In *Bhinder* the Supreme Court split three ways on the correct way to interpret the federal BFR proviso in an adverse effects case.

error in law for the Tribunal, having found that the *bona fide* occupational requirement existed, to exempt the appellant from its scope.

...

46 I cannot, however, leave this case, without further reference to the case of *O'Malley*. On facts for all purposes identical to those at bar, Mrs. O'Malley has received protection from the religious discrimination against which she complained and Bhinder has not. The difference in the two cases results from the difference in the two statutes. The *Ontario Human Rights Code* in force in the *O'Malley* case prohibited religious discrimination but contained no *bona fide* occupational requirement for the employer. The *Canadian Human Rights Act* contains a similar prohibition, but in s. 14(a) is set out in the clearest terms the *bona fide* occupational requirement defence. As I have already said, no exercise in construction can get around the intractable words of s. 14(a) and Bhinder's appeal must accordingly fail. It follows as well from the foregoing that there cannot be any consideration in this case of the duty to accommodate referred to in *O'Malley* and contended for by the appellants. The duty to accommodate will arise in such a case as *O'Malley*, where there is adverse effect discrimination on the basis of religion and where there is no *bona fide* occupational requirement defence. The duty to accommodate is a duty imposed on the employer to take reasonable steps short of undue hardship to accommodate the religious practices of the employee when the employee has suffered or will suffer discrimination from a working rule or condition. The *bona fide* occupational requirement defence set out in s. 14(a) leaves no room for any such duty for, by its clear terms where the *bona fide* occupational requirement exists, no discriminatory practice has occurred. As framed in the *Canadian Human Rights Act*, the *bona fide* occupational requirement defence when established forecloses any duty to accommodate.

47 ...Whether a statutory change to create a similar exemption for application in the work place is desirable in Canada is not a matter for this Court, and it is my opinion that this Court may not create such an exemption judicially. I would therefore dispose of this appeal as indicated above.

NOTE: As a result of this decision there seemed to be two different exculpatory doctrines or ways of conceptualizing the limits on the right to equal treatment without discrimination, depending on whether the BFR test of *Etobicoke* was held to apply or the seemingly more flexible duty of reasonable accommodation from *O'Malley*. The differences between the two approaches spawned a wave of litigation and redrafting of statutes.

In response *inter alia* to the litigation in *O'Malley*, the Ontario legislature amended the *Code* in 1981 to explicitly indicate that "constructive discrimination" is prohibited. S. 10 of the 1981 *Code* read as follows:

(1) A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or consideration is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right

The SCC decision in *Bhinder*, in deciding that no duty to accommodate arises in circumstances in which a requirement has been found to be a BFOQ, threatened substantially to reduce the scope of the intended expansion of the *Code* to encompass constructive discrimination. In 1986, through the passage of the *Equality Rights Statute Law Amendment Act* (S.O. 1986, c. 64), this problem was rectified by introducing an explicit requirement to make reasonable accommodation even in cases of constructive discrimination. The new provision, now numbered s. 11, reads as follows:

11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, a Board of Inquiry, or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside source of funding, if any, and health and safety requirement, if any.

(3) The Commission, a Board of Inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

The cases that follow track the courts' attempts to determine which approach to determining the limits on the right to equal treatment without discrimination applies when, always taking account of the specific provisions of the legislation in issue. Ultimately the Supreme Court decided to set out a unified test in *Meiorin* (*infra*, p. 157), but since this test includes elements of both the BRF test and the idea of duty to accommodate, it is worth exploring in detail how each of these ideas developed.

Brossard v. Québec (Commission des droits de la personne), [1988] 2 S.C.R. 279 was the Court's next effort to make sense of the doctrine. The issues before the Court and its reasoning can be summarized as follows:

The appellant municipality sought to defend an anti-nepotism policy which disqualified from employment members of the immediate family of full-time employees and town councillors. The Complainant's application for summer employment as a lifeguard was not considered because she was the daughter of a full-time typist at the municipal police station.

At the time the relevant exculpatory provision, Section 20 of the Quebec Charter, provided:

20. A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment ... is deemed non-discriminatory.

Beetz, J., writing for the majority, found that the absence of a real or perceived conflict of interest on the part of a job applicant constituted a valid "aptitude or qualification" for the purposes of s.20, as it related to the "necessity that the town, as a publicly accountable body, have a civil service free from conflict of interest."

Turning to whether the policy was "required in good faith for employment", Beetz J. applied the subjective-objective test from *Etobicoke*. He accepted that the policy was imposed honestly and met the subjective element of the test. Regarding the objective component, i.e. that the "requirement ... is reasonably necessary to assure the efficient and economic performance of the work", Beetz J. held that the "reasonable necessity" of the requirement could be examined on the basis of two questions:

- Is the aptitude or qualification rationally connected to the employment concerned? ...
- Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies?

Beetz J. asserted that the second question allowed the court to "inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question..." While accepting that an absence of actual or perceived conflict of interest was rationally connected to employment by the municipality, Beetz J. held that "[t]he rule must still be properly designed to ensure that the aptitude or qualification is met without placing an undue burden on employees or candidates for employment."

Beetz J. described the anti-nepotism policy, which allowed for no exceptions and did not take into account the "degree of likelihood that an abuse of power will take place", as "disproportionately stringent in view of the aptitude or qualification which it seeks to verify." He found that to be valid, the exclusionary rule "must be tailored to the employment in question so that it can be said to preclude real conflicts of interest, potential conflicts of interest which are reasonably likely to arise and the appearance of conflicts of interest founded on a reasonable apprehension of bias." Beetz J. left open the possibility that a properly crafted anti-nepotism policy could be found to be non-discriminatory; he suggested that factors such as the size of the municipality and its public service, the nature of its administrative structure, the nature of the positions occupied as related to its potential for the abuse of power, and the nature of the family relationship in question could be relevant to such a determination.

Wilson J., concurring, took a broader view of the purpose of the anti-nepotism policy in that it sought to avoid a "threat to the integrity of the town's administration either in reality or in the public perception"; however, Wilson J. found that even in view of this wider aim, the total ban imposed by the town was unnecessary and that "less drastic" means could and should have been employed.

Chapter 4: 'Reasonable' Accommodation/'Undue' Hardship

NOTE: *Meiorin* (p. 194) suggested that there are two dimensions along which a Respondent's conduct can be assessed in order to decide whether all reasonable accommodation short of undue hardship has been made. The first is 'procedural' in the sense that it focuses on the efforts made to look for a workable accommodation. The second is substantive, and takes us to the ultimate issue in determining whether the Respondent's conduct is justified, namely when the burden that would have to be imposed in order to include the Complainant in whatever benefit or opportunity is at stake counts as "undue hardship". Arguably the second is more important in determining the scope of protection against discrimination since it tells us how much sacrifice employers, etc. must accept for the sake of equality. Given that the burden of proof to establish justification is on the Respondent, cases decided on procedural grounds – the Respondent failed to show no available accommodation – do not tell us much about what really counts as "undue hardship". (These cases do, however, tell us something about what Respondents *think* undue hardship means.) When a Respondent loses for not having tried hard enough, we know that a particular level of sacrifice (whatever the Respondent had been willing to accept) is *not* too high, but we don't know what would be too high. As you read the cases, pay attention to when the decision hinges on the procedural assessment and when adjudicators go further and actually grapple with the meaning of "undue hardship".

What do you think it tells us when a significant percentage of cases are decided on the burden of proof?

Also notice how the *Meiorin* test is used.

- What role does each step play? Are the cases consistent?
- Are there some kinds of cases to which the test is better suited than others? Why?
- How might the test be adapted to respond?

A. Starting Points

Central Okanagan School District No. 23 v. Renaud

[1992] 2 S.C.R. 970

The judgment of the Court was delivered by

SOPINKA J. -- The issue raised in this appeal is the scope and content of the duty of an employer to accommodate the religious beliefs of employees and whether and to what extent that duty is shared by a trade union. While this duty has been recognized and discussed as it relates generally to employers (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at pp. 552-56, and *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 520-29), little judicial consideration has been given to the question raised by the involvement of a collective agreement and a certified trade union. Is a trade union liable for discrimination if it refuses to relax the provisions of a collective agreement and thereby blocks the employer's attempt to accommodate? Must the employer act unilaterally in these circumstances? ...

officers and the public was unacceptable. It held that the Police Board's uncorrected vision standard was a BFOR.

[108] From my review of the cases, I conclude that most adjudicators have found job requirements justified as BFORs if allowing the complainant to perform the job would represent a real and significant increase in the magnitude of risk to the complainant and others. *Meiorin* and *Grismer* established risk is not an independent justification for a BFOR but merely one factor in the analysis of undue hardship. In this case, the change to risk entailed by accommodating Mr. Pannu includes some increase in the magnitude of risk and, more significantly, a complete shift of that risk from Mr. Pannu to the Utilityman. I am satisfied on the evidence that there is no way to spread this risk or reduce it further. If Mr. Pannu is to work as a Recast Operator, the Utilityman on his shift must be designated to do the emergency shut down along with the ARO. Weighing the low but real likelihood of a major gas leak and the very high magnitude of the risk, should an emergency occur, I find that the shift in risk from Mr. Pannu to the Utilityman on his shift is both real and significant.

[109] Considering the possible substantial impact on the collective agreement, the fact that there is some increase in the magnitude of the risk, and the significant shift in who bears the risk, I find that Skeena has established undue hardship on a balance of probabilities.

[110] Since Skeena has established that it is more likely than not that accommodating Mr. Pannu would constitute undue hardship, it has justified its failure to accommodate him by keeping him in the Recast Operator position. The complaint against Skeena is dismissed.

Note: in *Oak Bay Marina Ltd. v. British Columbia (Human Rights Tribunal)* (no. 2) (2002), 43 C.H.R.R. D/487, the B.C. Court of Appeal dealt with an appeal from a Tribunal decision holding that Robert Gordy had been discriminated against by Oak Bay Marina on the basis of a mental disability. In the summers of 1994 and 1995, Gordy had successfully worked as a fishing guide for OBM at its lodge in Campbell River. In May 1995, he developed bipolar affective disorder and was hospitalized for two weeks. On June 6, not yet fully recovered from a manic episode, Gordy met with the lodge manager to inquire about returning to work as a guide. It was conceded that at that date, Gordy was behaving strangely and was not yet capable of returning to work. In fact, he went back to hospital on June 6, where he remained until June 23. Gordy met with the manager again on July 17, indicating that he was stable and wanted to return to work. The manager refused to let him return to work, but invited him to return later in the summer. Gordy took this as a refusal to employ him. On July 19 he met with his doctor and asked him to write to OBM about his fitness to work. His doctor wrote that day, assuring OBM that Gordy was fit to work and offering to provide further information about bipolar disorder as desired. OBM did nothing in response to the doctor's letter. Gordy filed a human rights complaint.

The Tribunal accepted the medical evidence that Gordy was fit to return to work provided some accommodations were made such as monitoring to detect onset of a manic phase, allowing a gradual return to full hours, and having him accompanied by another guide as was done with rookie guides. The Tribunal held that OBM's manager should not have considered Gordy's erratic behaviour on June 6 in making his decision about whether to allow him to return to work on July 17. Rather, OBM should have contacted Gordy's doctor to get his assessment, and then investigated whether accommodations could be

made that would have allowed Gordy safely to return to work. OBM was found to have discriminated against Gordy on the basis of disability and to have failed to make out a BFR defence. Thus, the Tribunal held that evidence of Gordy's earlier erratic behaviour was irrelevant to whether OBM's refusal to rehire was *bona fide*. This decision was appealed to the B.C. Supreme Court, which held that it was an error of law to hold that the evidence of Gordy's behaviour on June 6 was irrelevant to the decision whether he could safely be allowed to return to work.

On appeal to the B.C. Court of Appeal, the Court agreed that Gordy's behaviour on June 6 was relevant and remitted the case to the Tribunal "so that the issue of BFOR may be decided upon all relevant evidence and on whatever facts may be found by the new adjudicator."

Newbury J. also offered the following *obiter* comments at para. 26:

In light of the extensive submissions we received, I also wish to comment on [an]other aspect of Mr. Gordy's case ... [I]t was said that even if OBM had had extensive medical information regarding bipolar disorder prior to June 1995, and even if that information had indicated that Mr. Gordy could not be rehired without jeopardizing guests' safety, then without anything more OBM should still be found liable under s. 13 of the *Code* by reason of "failure to investigate". I do not read any of the authorities to which we were referred as going so far as to impose a "process" of investigation on an already informed employer. If, as McLachlin C.J.C. suggested in *Grismer* (at § 43) and *Meiorin* (at §35–36), the question of accommodation is to be approached with some "common sense", it seems to me that the employer's, as well as the complainant's, circumstances would have to be considered carefully in imposing such an obligation. What is "possible" for one employer – e.g., a government with entire departments and volumes of information available to it – may not be possible for a private company that has to make a decision amid operational pressures posed by scheduling, customer relations, profitability and legal liability. (Certainly, the Tribunal Member gave no consideration to whether OBM would have been under a "duty to warn" its guests of the risks posed by using Mr. Gordy's services.) Similar considerations bear on the other aspects of accommodation – whether the employer can in fact fit in a gradual return to work or place the employee elsewhere, or can actively supervise him or her or "monitor" his or her medications. These are more subtle and difficult questions that were overshadowed in this case by the Member's assumption that direct experience could not be considered by OBM in making its decision.

Saunders J. offered her own comments as follows:

The *Human Rights Code*, R.S.B.C. 1996, c. 210 is, as my colleague observes, applicable to both public and private employers, large and small. Some employers have considerable internal resources and some have only the business and practical acumen acquired in a lifetime. Given the breadth of the legislation's application and its intimate effect upon the essential operations of the workplace, it is important, in my view, to acknowledge that the legislation does not require that issues be referred to professional experts, not always readily accessible in this vast province. Where, as here, a decision may be based upon personal observation and a general understanding of attendant risks, I would not preclude the decision maker from supporting its view of the risks with after-acquired knowledge, to the extent it may be able to do so. This necessarily means that mere failure to investigate is not, itself, a breach of the legislation, although clearly an employer who seeks more

comprehensive knowledge when faced with a decision is less likely to base a decision upon unsupportable impressions.

The value of human rights legislation is great and the courts accord more than usual deference to decisions of human rights tribunals. Human rights legislation, however, fits within the entire legal framework within which enterprises must function. That framework includes other standards that also reflect deep values of the community such as those established by workers' compensation legislation prohibiting an employer from placing an employee in a situation of undue risk, and the standards of the law of negligence, for example the standard that applies to Oak Bay Marina Ltd. for its clients. Even as full adherence must be given to the standards of human rights, a human rights tribunal must be mindful of the fuller legal framework regulating an enterprise when it assesses the occupational requirements asserted by that enterprise, and decide in a fashion harmonious with that framework in order not to force non-compliance with some legal obligations in exchange for compliance with the human rights legislation.

ii. Interests of Others

Note: Many cases hinge on the argument that accommodation would be too disruptive of the workplace or would compromise the interests of other workers. When are other workers' interests a good enough reason to justify a policy that would otherwise be discriminatory? What is the alternative to imposing the burden on other workers? Is it adequately canvassed?

Re Dominion Colour Corp. and Teamsters Chemical, Energy and Allied Workers, Local 1880

(1999) 83 L.A.C. (4th) 330

Both grievances arise from the Company laying off the individual grievor (herein "Metcalf") because she was pregnant. The Company's manufacturing process involves the processing of lead oxide, and Metcalf was laid off because the Company claimed that it could not find a way to accommodate her inability as a pregnant woman to continue to accept the exposure to lead that was involved in her regular job.

It is to be noted that the collective bargaining agreement contains no provision dealing with the accommodation of pregnant employees. Neither does it contain any provisions explicitly prohibiting discriminatory treatment on the grounds of gender or requiring accommodation of a disabled employee.

However, both the Company and the Union are in agreement that the current arbitration jurisprudence respecting a grievance arbitrator's jurisdiction to interpret and apply the *Human Rights Code*, R.S.O. 1990, H.19, establishes that, as the arbitrator in this case, I have, effectively, the jurisdiction of a board of inquiry under the *Human Rights Code*. Accordingly, it follows that I have the jurisdiction to determine whether the Company's treatment of the grievor could be said to be in breach of the Code and, if it is, to decide what remedies apply.

...

Facts

share in the cost of providing access to people with disabilities rather than requiring the University and its students to bear the burden alone. There may be a reasonable explanation for why the government has accepted that burden for some students but not for others; however, the explanation is not apparent to me.

Note: In *Turnbull v. Famous Players Inc.* (2001), 40 C.H.R.R. D/333 (Ont. Bd. Inq. (Matthew D. Garfield)) five would-be movie goers who use a wheelchair due to a mobility impairment filed complaints against Famous Players Inc. with the Ontario Human Rights Commission. The main issues involved the lack of wheelchair accessibility in some of Famous Players' theatres. In its defence, Famous Players argued that it spent a significant amount to make two of its theaters wheelchair accessible, but that it had not renovated the others because of its plans to build new, state-of-the-art and fully accessible multiplexes while closing the older, outdated, inaccessible theatres. It submitted that renovating older theatres slated for closure would be an "improvident use of resources" that would amount to undue hardship. The Board dealt with the argument as follows:

"Improvident Use" Defence

[209] The Board rejects Famous Players' argument regarding "improvident use of resources". The Board notes that the respondent has not provided the Board with any case law where this argument has been accepted and imported into the consideration of "cost" under the duty to accommodate to the point of undue hardship. That of course does not defeat its argument which is indeed a novel one.

[210] Famous Players could have produced its financial statements and other financial information regarding the company and the specific theatres in question. It refused. The Commission's and complainant Wong-Ward's motions for production were denied on the basis that Famous Players' counsel undertook that it would not argue inability to pay for the renovations as a defence, but that it was an improvident use of money. Indeed, its Amended Response makes no mention of an "inability to pay" defence. Accordingly, the Board ruled that the ability of the respondent to shoulder the cost of the renovations or the profitability of the theatres in question were not in issue. The confidential information sought (financial statements of the company, profit/loss information for individual theatres) was not arguably relevant given Famous Players' position with respect to its defences.

[211] Famous Players is attempting to do indirectly what it chose not to do directly: argue the "cost" defence. In this case, the Board sees the respondent's argument of "improvident use" of money as tantamount to a defence of "wasted money" or "throwing good money after bad". Such considerations do not form part of "cost" in the s. 17 defence. To allow otherwise would significantly lower the bar for the accommodation requirement. This would thwart the direction the Supreme Court of Canada has given regarding the importance of not setting too low a threshold for accommodation. This is reflected in the Court's comments in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at § 41 ...:

Exemptions: Special Cases

Note: In the last chapter, we looked at how the general 'defence' to a discrimination complaint has developed. It requires the respondent to show that the practice or policy challenged constitutes a *bona fide* requirement, which now includes the requirement to show reasonable efforts to accommodate the applicant. In some Codes the BFR 'defence' is available in response to any complaint. The Ontario Code is very different. Instead of a general prohibition on discrimination in particular circumstances on particular grounds, the Ontario Code prohibits discrimination more selectively – some grounds are included in the prohibition in some spheres that are excluded from other spheres. Likewise, the Ontario Code includes an array of exemptions from liability that are specifically tailored to permit discrimination under certain circumstances. Sometimes the tailoring identifies a particular ground or grounds on which discrimination is permitted; sometimes it identifies a type of employment or service or accommodation in which discrimination on the basis of some grounds is permitted. This tailoring can also extend to varying the test for exemption from liability depending on the circumstances. Sometimes the *Meoirin* test (BFR + accommodation) is mandated; sometimes an exemption turns solely on whether a BFR test is met; sometimes exclusion based on a prohibited ground is categorically permitted, provided that certain conditions are met within the sphere within which the exemption operates.

Many Codes have some provisions that are subject to a limitation that is different in some way from the *Meoirin* test. In this chapter we turn to look at a selection of these provisions and the issues they raise. The Ontario Code is unusual in the precision with which liability has been defined by carving out partial or total exemptions to the various prohibitions it enacts. All this makes the structure of the Ontario Code very complex, and it is worth pausing to get a sense of that complexity.

The chart below tries to categorize the different kinds of exemptions included in the *Ontario Human Rights Code* in order to provide a sense of their complexity. The chart does not include s. 11 of the *OHRC*, which seems on its face to apply to all grounds and all spheres. That is, use of a neutral rule that has the effect of excluding some people identified by a protected ground is subject to a BFR and accommodation defence across the board. Section 11 is, in effect, a codified version of the *Meoirin* test and sets the benchmark against which the requirements of other provisions should be assessed. The chart is concerned with the other exemptions from liability that populate the Ontario Code and may deviate in some way from the standard test.

In light of this, what do you think is the philosophy of the drafters of the Ontario Code by comparison with, for example, the *Canadian Human Rights Act*? Why do you think the Ontario legislature has tried to define specific exemptions from liability rather than leaving it to adjudicators to decide based on general principles?

These special exemptions are all litigated in the shadow of *Meoirin*, as it were. Think about the pull that the test in that case exerts as you read these cases.

Note: The issue in *Caldwell* of whether the Human Rights Codes prohibit the dismissal of teachers for what has been called "denominational cause" arises in the context of the constitutional protections provided for separate schools by s. 93 of the *Constitution Act*. Relying on s. 93, the courts have independently decided that the separate schools in Ontario had, prior to 1867, a right to dismiss for denominational cause which was preserved by s. 93. This was held, in *Re Essex County Roman Catholic Separate School Board and Porter et al.* (1978), 89 D.L.R. (3d) 445 (Ont. C.A.), to deprive a Board of Reference of jurisdiction to order the reinstatement of teachers fired for having married contrary to the teachings of the Catholic Church. In the Court of Appeal, Zuber J. suggested, however, that the teachers may have had a right to sue for damages for wrongful dismissal even though they had no right to reinstatement.

The constitutional issue has arisen again recently with amendments to the *Education Act* in Ontario. In *Daly v. Ontario (Attorney General)* (1999), 44 O.R. (3d) 349, the Ontario Court of Appeal declared s. 136 of the *Education Act*, R.S.O. 1990, c. E.2, to be of no force and effect because it violates the denominational guarantee contained in s. 93(1). S. 136 provided:

136(1) For the purpose of maintaining the distinctiveness of separate schools, the Roman Catholic separate school board may require as a condition of employment that teachers hired by the board after the ten school year period mentioned in subsection 135(6)* agree to respect the philosophy and traditions of Roman Catholic separate schools in the performance of their duties.

(2) Subject to subsection (1), and despite section 24 of the *Human Rights Code*, section 5 of the said code applies to ensure that such teachers employed by a Roman Catholic school board will enjoy equal opportunity in respect of their employment, advancement and promotion by the board.

(3) If it is finally determined by a court that subsection (1) or (2) prejudicially affects a right or privilege with respect to denominational schools guaranteed by the constitution of Canada, subsections (1) and (2) are repealed, it being the intention of the Legislature that the remaining provisions of the Act are separate from and independent of the said subsections.

Section 24 of the *Human Rights Code* would allow a Roman Catholic school board to give a preference in hiring and promotion to Roman Catholics if it could be shown that this was a *bona fide* occupational requirement. The Court held that ss. (2) of s. 136 of the *Education Act* prevents the application of s. 24 of the Code, but that doing so violates s. 93. Application for leave to appeal this decision to the Supreme Court was denied.

The argument that a denominational school should be free to discipline teachers for infractions of religious rules, even when that might otherwise constitute discrimination on a prohibited ground, has not been confined to "s. 93 schools". See *Garrod v. Rhema Christian School* (1991), 15 C.H.R.R. D/477.

* The reference in s. 136(1) to, "the ten school year period mentioned in subsection 135(6)" is a reference to the fact that when public funding was extended to Roman Catholic separate high schools a number of teachers, including non-Catholic teachers, who were then employed by the public school boards were designated and transferred to the Roman Catholic school boards in order to teach the large number of students who would be transferring from the public school system to the separate school system.

Note: In *Trinity Western University v. British Columbia College of Teachers* [2001] 1 S.C.R. 772, the exemption from human rights obligations enjoyed by religious educational institutions was used as something of a sword, rather than just a shield. TWU is a private university associated with the Evangelical Free Church of Canada. For some time it had offered a teacher training program in co-operation with Simon Fraser University. In the five year program, students spent the last year either at SFU or supervised by SFU faculty. TWU applied to the College of Teachers for accreditation for a program that would be conducted exclusively through TWU. Part of its reason was the desire that its program fully reflect its Christian world view. Its application for accreditation was rejected on the ground that it was contrary to the public interest to accredit a program offered by an institution that followed discriminatory practices. BCCT objected to the fact that all students and faculty at TWU were required to sign a statement of "Community Values", committing them to "refrain from practices that are biblically condemned", including *inter alia* "sexual sins, including pre-marital sex, adultery, homosexual behaviour, and viewing of pornography". TWU challenged the refusal to grant accreditation.

A majority of the Supreme Court, including McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ., held that BCCT's refusal to take into account the religious freedom interest of TWU was a mistake of law. The majority's reasons are summarized as follows in the headnote in the S.C.R.

At the heart of the appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared by society generally. While TWU is a private institution that is exempted, in part, from the B.C. human rights legislation and to which the Canadian *Charter of Rights and Freedoms* does not apply, the BCCT was entitled to look to these instruments to determine whether it would be in the public interest to allow public school teachers to be trained at TWU. Any potential conflict between religious freedoms and equality rights should be resolved through the proper delineation of the rights and values involved. Properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. The proper place to draw the line is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. Acting on those beliefs, however, is a different matter. If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT. In this way, the scope of the freedom of religion and equality rights that have come into conflict can be circumscribed and thereby reconciled.

Here, by not taking into account the impact of its decision on the right to freedom of religion of the members of TWU, the BCCT did not weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU. Consideration of human rights values in the present circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation. Even though the requirement that students and faculty adopt the Community Standards creates differential treatment since it would probably prevent homosexual students and

faculty from applying, one must consider the true nature of the undertaking and the context in which this occurs. Many Canadian universities have traditions of religious affiliations. Religious public education rights are enshrined in s. 93 of the *Constitution Act, 1867*. Moreover, a religious institution is not considered to breach B.C. human rights legislation where it prefers adherents of its religious constituency. It cannot be reasonably concluded that private institutions are protected but that their graduates are *de facto* considered unworthy of fully participating in public activities. While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the public school system. There is nothing in the TWU Community Standards, which are limited to prescribing conduct of members while at TWU, that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. The evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct. In addition, there is no basis for the inference that the fifth year of the TWU program conducted under the aegis of SFU corrected any attitudes which were the subject of the BCCT's concerns. On the evidence, the participation of SFU had nothing to do with the apprehended intolerance from its inception to the present. Rather, the cooperation was intended to support a small faculty in its start-up stage.

L'Heureux-Dubé J. dissented. Her reasons were summarized as follows:

The BCCT's decision not to accredit a free-standing TWU teacher-training program should be upheld. The BCCT's conclusion that TWU's Community Standards embodies a discriminatory practice is not patently unreasonable. Signing the contract makes the student or employee complicit in an overt, but not illegal, act of discrimination against homosexuals and bisexuals. It is not patently unreasonable for the BCCT to treat TWU students' public expressions of discrimination as potentially affecting the public school communities in which they wish to teach. Although tolerance is also a fundamental value in the Community Standards, the public interest in the public school system requires something more than mere tolerance.

... It is reasonable to insist that graduates of accredited teacher training programs be equipped to provide a welcoming classroom environment, one that is as sensitive as possible to the needs of a diverse student body.

The modern role of the teacher has developed into a multi-faceted one, including counselling as well as educative functions. Evidence shows that there is an acute need for improvement in the experiences of homosexual and bisexual students in Canadian classrooms. Without the existence of supportive classroom environments, homosexual and bisexual students will be forced to remain invisible and reluctant to approach their teachers. They will be victims of identity erasure. The students' perspective must be the paramount concern and, even if there are no overt acts of discrimination by TWU graduates, this vantage point provides ample justification for the BCCT's decision. The BCCT's decision is a reasonable proactive measure designed to prevent any potential problems of student, parent, colleague, or staff perception of teachers who have not completed a year of training under the

supervision of SFU, but have signed the Community Standards contract. The courts, by trespassing into the field of pedagogy, deal a setback to the BCCT's efforts to ensure the sensitivity and empathy of its members to all students' backgrounds and characteristics.

Nixon v. Vancouver Rape Relief Society

2002 BCHRT 1 (MacNaughton)

Note: Kimberly Nixon is a post-operative male to female transsexual. While born male, she realized at an early age that her physical state did not accord with her own sense of self as a female. At age 30, she decided she could not continue to live as someone she was not and began to live full-time as a woman, eventually having sex reassignment surgery four years later. Her birth certificate was subsequently amended to record her sex as female.

Vancouver Rape Relief is a non-profit, feminist organization whose mandate is to provide services to female victims of male violence and to fight violence against women. VRR's services include a twenty-four-hour rape crisis line, a transition house for women and their children, emotional and informational support, referrals, and group counselling. The organization is based on the philosophy that women's oppression consists in a dense network of attitudes, practices, and behaviours that harm women, and that only women who have experienced that oppression can understand its nuances so as to help other women come to terms with their victimization as women. At the time of its opening, VRR sought an obtained permission from the Human Rights Commission, as permitted under the Code, to hire only women. VRR operates as a non-hierarchical collective of unpaid volunteers and paid staff members. Not all of its volunteers are members of the collective, but to remain a volunteer after a certain period of time, membership is required. VRR delivers its services to the community through these volunteers, staff and collective members. All members of the collective are required to be involved in the crisis work of the agency: answering the crisis line, assisting callers in person and working in the transition house.

In the summer of 1995, Kimberly Nixon responded to a VRR call for volunteers who wished to be trained as peer counselors for victims of male violence. Nixon wished to volunteer at VRR because she herself was physically and emotionally abused by her male partner following her sex reassignment surgery. She had also, while living as a woman, been the victim of a sexual assault.

After contacting VRR, Nixon was invited to attend a pre-screening interview, which is intended to ensure that a prospective volunteer adheres to the values and beliefs of the organization. If the prospective volunteer accepts these beliefs, she is advised of the next training session. There are no other requirements for potential volunteers except that they are women. Nixon indicated that she accepted VRR's beliefs and was invited to attend the next training session. The training program is either six or twelve weeks in length and includes a practicum.

At the first training session, one of the facilitators identified Nixon as a transsexual by her appearance. When Nixon confirmed that she had not been born a woman, she was asked to leave the training group. She was advised that only those who had been women